

K.S.A. 44-534a grants the right to appeal from preliminary hearing orders concerning specific statutorily listed issues. One such issue is whether or not an accident

arose out of and in the course of claimant's employment. Contesting the employer and employee relationship in a workers compensation matter would come under the umbrella of K.S.A. 44-534a as it is a disputed issue as to whether an injury arose out of and in the course of the employee's employment. As such, the Appeals Board has jurisdiction to consider this matter.

Claimant, a trucker for respondent, alleges an employment relationship existed on January 14, 1995, the day he fell from his truck suffering multiple severe injuries. Respondent, on the other hand, contends this was an arm's-length arrangement with claimant being an independent contractor and thus not entitled to the workers compensation benefits normally available in Kansas. The primary test deals with the right of respondent to control claimant's actions and the right of the respondent to control the use of the claimant's tractor and trailer. As part of the agreement claimant agreed to lease to the respondent his tractor and trailer with claimant being granted the right to use the tractor and trailer if available at the time he made his runs. While claimant did use his tractor on a regular basis before the injury, he never had the opportunity to use his trailer during the time he was driving for respondent. It is further significant that the respondent continued to use claimant's trailer after claimant's date of injury while claimant was in the hospital.

Another question which must be considered in employer/employee situations is who has the right to control claimant's activities. In this instance claimant was told by respondent what loads to haul and where they were to be delivered. While claimant could dictate the route to follow and the specific times when he would drive, it was dictated by the respondent the latest time a load could arrive. After delivering a load, claimant would contact respondent for his next assignment.

Respondent contends claimant was an independent contractor as shown by a copy of the proposed contractual agreement between claimant and respondent. While this contract had been delivered to claimant for his review, he had returned it to respondent unsigned, with certain specific objections to the terms contained therein. One of the terms of the contract specifically objected to by the claimant is found in Section 17 of the contract wherein claimant is required to furnish his own workers compensation insurance coverage. Claimant had, in the past, provided his own comprehensive and collision insurance, but at no time had he ever provided his own workers compensation insurance. It appears an employer/employee relationship was contemplated by claimant. Respondent alleges no written contract was ever signed and thus no employer/employee relationship existed.

Oral contracts are enforceable in the State of Kansas with a three (3) year statute of limitations for the enforcement of same. See K.S.A. 60-512. Further, the mere intention to reduce an informal agreement to a formal writing is not of itself sufficient to show that the parties intended that until the formal writing was executed the informal agreement should be without binding force. King v. Wenger, 219 Kan. 668, 549 P.2d 986 (1976). K.S.A. 44-501(g) states:

"It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act should be applied impartially to both employers and employees in cases arising thereunder."

This signifies an intent by the Legislature that employees be covered by the Workers Compensation Act in the State of Kansas, unless specifically excluded under K.S.A. 44-505.

K.S.A. 44-501 and K.S.A. 44-508(g) require claimant to prove his entitlement to benefits under the Workers Compensation Act by a preponderance of the credible evidence. The Appeals Board finds, based upon the circumstances surrounding this case, that claimant was an employee of D & R Trucking on the date of injury and is entitled to benefits under the Workers Compensation Act. The forfeiting by the claimant of control over his tractor and trailer, coupled with the evidence regarding the control maintained by the respondent over claimant's actions, is sufficient to convince the Appeals Board that claimant was an employee of the respondent. Further, claimant's objection to the contractual clause requiring claimant to provide his own workers compensation insurance is added evidence of claimant's intentions in entering this contractual relationship.

The Appeals Board follows the intent of the Legislature expressed in K.S.A. 44-501(g) in finding claimant to be an employee of the respondent thus providing claimant the protection afforded by the Workers Compensation Act.

The Administrative Law Judge, in his Order of April 17, 1995, in finding claimant to not be an employee of the respondent, did not address the issues of temporary total disability, outstanding medical expenses or continuing medical treatment with Dr. Tisdale. The Appeals Board remands this matter back to the Administrative Law Judge for further proceedings consistent with this opinion.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge George R. Robertson dated April 17, 1995, shall be and is reversed and this matter is remanded back to the Administrative Law Judge for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of August, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David V. Jackson, Wichita, Kansas
C. Stanley Nelson, Salina, Kansas
George R. Robertson, Administrative Law Judge
David A. Shufelt, Acting Director